

# HR Law Hotline

September 24, 2021

## INDIA'S LAW ON PREVENTION OF SEXUAL HARASSMENT AT WORKPLACE: ANALYSIS OF RECENT CASE LAWS - PART 3

India's law on prevention of workplace sexual harassment continues to gain traction in spite of the Covid-19 lockdown and employees working remotely. Incidentally, the definition of 'workplace' under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 of India ("**PoSH Act**") includes "a dwelling place or a house". While that was primarily meant to cover domestic helpers, it could extend to employees working from home.

While the shift to a virtual workspace has reportedly lead to a decline in the total number of sexual harassment complaints in India<sup>1</sup>, sexual harassment continues to occur in more subtle ways such as inappropriate messages, calls/texts at odd hours, sexist remarks, taking screenshots without one's knowledge during video calls etc.<sup>2</sup> Considering the lockdown since March 2020, cases relating to PoSH Act have been heard on video conferencing and the judgments have been pronounced virtually, keeping in mind the urgency and gravity of the situation.

Following our previous legal alerts in **2019** and in **2020**, we are delighted to share *Part 3* of our analysis of some of the recent and pertinent case laws on PoSH Act related aspects.

### A. WHAT IS "SEXUAL HARASSMENT"?

1. The Kerala High Court upheld the principles laid down in its previous judgment<sup>3</sup> and opined that sexual harassment at the workplace should start from an express or implied sexual advance or unwelcome behaviour which has a 'sexual' tone behind it.<sup>4</sup> In the absence of a 'sexual' tone to the behaviour, provisions of the PoSH Act will not apply. The court further clarified that the definition of 'sexual harassment' under the PoSH Act is an inclusive definition and accordingly any other form of 'sexual' treatment or 'sexual' behaviour can fall under the purview of the PoSH Act.
2. The Madhya Pradesh High Court observed that the conduct of the supervisor amounted to 'sexual harassment' as such conduct created an intimidating and hostile work environment for the complainant which included acts such as commenting on the complainant's dress and outfits, suggesting that he would make work difficult for her if she was not good to him, speaking in a manner which was offensive to her dignity and chastity etc.<sup>5</sup> In this case, since the female employee (complainant) was terminated from employment for no fault of hers, the Court held that the aggrieved woman was entitled to compensation of Rs. 2,500,000 (approx. US\$ 34,000) for the pain and suffering, loss of reputation, emotional distress and loss of 18 months' salary, besides provident fund and other monetary dues. The court also directed the employer to issue the female employee a character and experience certificate for the period she was in employment with the employer without attaching any stigma whatsoever. The court imposed a penalty of INR 50,000 (approx. US\$ 680) upon the employer under Section 26 of the PoSH Act for not constituting an Internal Complaints Committee (**ICC**) at the relevant time.

### B. SEXUAL HARASSMENT DOES NOT NECESSARILY HAVE TO BE MAN V. WOMAN

3. The High Court of Calcutta clarified that sexual harassment complaints against another individual of the same gender is maintainable under the PoSH Act.<sup>6</sup> In this respect, the court pointed out that there is nothing under the PoSH Act which precludes a same gender complaint and that a person of the same gender can also hurt the modesty or dignity of a woman. The court pointed out that *'although it might seem a bit odd at the first blush that people of the same gender complain of sexual harassment against each other, it is not improbable, particularly in the context of the dynamic mode which the Indian society is adopting currently, even debating the issue as to whether same-gender marriages may be legalized'*.

### C. CONSTITUTION & FUNCTIONING OF THE ICC

4. The Supreme Court of India (**SC**) held that there was a fundamental defect in the constitution of the ICC as the external member on the ICC was found not to be an independent third party in accordance with the provisions of Section 4(2)(c) of the PoSH Act. In this case, it was noted that the external member on the ICC was appearing on behalf of the employer (bank) as a panel lawyer and was therefore not independent.<sup>7</sup> In this context, the SC observed that the purpose of having an external member is to ensure the presence of an independent person who can aid, advise and assist the ICC.
5. The Bombay High Court set aside the report of the ICC as it was observed that the external member on the ICC was not a member of any non-governmental organisation or association committed to the cause of women or a

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- person familiar with the issues relating to sexual harassment.<sup>8</sup> In this case, the court also pointed out the importance of organising regular orientation or training programmes for the members of the ICC to deal with complaints and steer through the process of settlement or conciliation with sensitivity.
6. The High Court of Delhi laid down the following requirements with respect to constitution and functioning of the ICC:
- Members of the ICC must be impartial *i.e.* they should not have any personal knowledge or interest in the case or be connected to the case in any manner
  - Members of the ICC should not have conflict with any of the parties involved
  - Objectivity needs to be maintained in the conduct of the proceedings
  - There should be no cause for bias for or against any of the parties
  - Members of the ICC ought to possess blemish-less credentials
  - Independent members are needed on the ICC to aid, advise and assist the ICC in a fair and impartial manner
  - An independent person should actually be someone external and cannot, for example, be the panel lawyer of a bank in a situation where the complainant and the respondent are employees of the bank
  - There should be no undue pressure and influence on the ICC from senior levels
  - In cases where persons who have been at the helm of affairs are themselves the respondents in a complaint, the ICC cannot be one of their choice or of persons who have worked under them
  - The ICC should follow a clear and precise procedure to deal with sexual harassment complaints
  - The principles of natural justice should be followed scrupulously
  - The proceedings should lend confidence and assurance to the complainant and make her comfortable
- m. The principles and guidelines laid down by the SC in the Vishaka judgment ought to be followed rigorously and not in a ritualistic manner irrespective of the enactment of the PoSH Act
- n. The inquiry proceedings should inspire the confidence of the Court.<sup>9</sup>

In this case, it was found that the ICC was improperly constituted as it comprised of three members who were part of the same department as the respondent was previously employed in and were in fact subordinate to him at that point in time. Since, it is the settled position under law that the ICC should be a body which is objective and neutral and not biased in any manner, the employer was ordered to re-constitute the ICC.

#### D. POWERS OF THE ICC

7. The Delhi High Court stressed upon the fact that the ICC's role was limited to holding an enquiry and submitting a report as per the provisions of the PoSH Act.<sup>10</sup> If a case of sexual harassment is made out, then the recommendations of the ICC can only be for taking appropriate action for misconduct in accordance with the provisions of the service rules as contained in Section 13 of the PoSH Act. If a case of sexual harassment is not made out by the ICC, the ICC can only conclude that no action is required to be taken. On the other hand, in this case, it was noted that the ICC had made observations in its report on the conduct of the parties (in spite of the conduct falling outside the scope of 'sexual harassment') and opined that the parties had indulged in an inappropriate / unbecoming conduct and indiscipline, and recommended that the competent authority take suitable action against them. The court pointed out that the ICC cannot make comments on the personal conduct of the parties and that the ICC's jurisdiction would be restricted to the allegations of sexual harassment and whether a complaint is made out or not to that effect.

#### E. DISCIPLINARY ACTION TO BE BASED ON THE INQUIRY AND IN ACCORDANCE WITH EXISTING SERVICE RULES

8. The SC held that the termination of an Associate Professor at a University who was alleged to have indulged in acts of sexual harassment, is illegal as it was issued without subjecting him to an inquiry as per the applicable service rules and the provisions of the PoSH Act.<sup>11</sup> Accordingly, the SC ordered reinstatement of the employee.
9. The High Court of Gauhati pointed out that in order to initiate a disciplinary proceeding under the service rules of the company, it must be preceded by a conclusion arrived at by the ICC that the sexual harassment allegations made against the person concerned have been proved.<sup>12</sup> Accordingly, the court ordered the employer to produce records establishing the fact that the allegations were proved before the ICC before the order of suspension and show-cause notice was issued to the employee.

#### F. ROLE OF ICC VIS-À-VIS DISCIPLINARY COMMITTEE IN SEXUAL HARASSMENT

10. The High Court of Orissa at Cuttack pointed out that if disciplinary action has been taken against an employee for indulging in an act of sexual harassment on the basis of an ICC report, the employer cannot re-initiate a fresh inquiry by its disciplinary committee as that would amount to a second inquiry.<sup>13</sup> In other words, once the inquiry report has been prepared by the ICC, the findings and the report of the ICC shall not be treated as a mere preliminary investigation or inquiry leading to a disciplinary action but shall instead be treated as the final finding/report in an inquiry into the misconduct of the delinquent.

#### G. CAN EMPLOYER DEVIATE FROM RECOMMENDATIONS OF THE ICC?

11. The High Court of Calcutta opined that the expression "*act upon the recommendation*" contained in Section 13(4) of the PoSH Act does not make it imperative for the disciplinary authority to act on the recommendations of the ICC by accepting it.<sup>14</sup> The expression "act upon the recommendation" would mean either accept or reject the recommendation, for reasons to be recorded in writing. If the recommendations were binding, it would cease to

be a recommendation and partake the character of a command which obviously is not the legislative intent. Accordingly, the recommendation of the ICC has to be seen and understood as a recommendation, nothing more nothing less. It is entirely upon the disciplinary authority to decide its next course of action upon giving the recommendation due consideration.

CONCLUSION

Various courts continue to discuss and interpret the provisions of the PoSH Act. Such decisions need to be taken note of and carefully analysed by the employer and the ICC, in view of the sensitivities involved in relation to the topic of sexual harassment at the workplace.

– Archita Mohapatra, Preetha S & Vikram Shroff

You can direct your queries or comments to the authors

<sup>1</sup> <https://www.livemint.com/companies/news/sexual-harassment-cases-at-offices-decline-in-fy21-11630864037305.html>  
<sup>2</sup> <https://www.livemint.com/news/business-of-life/even-in-the-virtual-office-sexual-harassment-continues-11594561717967.html>  
<sup>3</sup> Anil Rajagopal v. State of Kerala and others [I.L.R. 2018 (1) Kerala 719]  
<sup>4</sup> Prasad Pannian v. The Central University of Kerala and Ors. 2021LLR384 (Kerala HC)  
<sup>5</sup> Global Health Private Limited v. Local Complaints Committee, District Indore and Ors.2020 LLR 40 (MP HC)  
<sup>6</sup> Malabika Bhattacharjee v. Internal Complaints Committee, Vivekananda College and Ors. 2021(1) SCT 431 (Calcutta)  
<sup>7</sup> Punjab and Sind Bank and Ors. v. Durgesh Kuwar AIR2020SC3040  
<sup>8</sup> Ruchika Kedia v. Internal Complaints, Goa Institute of Management, Through Its President Prof. Annamika Sinha And Ors. 2020 SCC Online BOM 139  
<sup>9</sup> Rashi v. Union of India And Another (MANU/DE/2178/2020)  
<sup>10</sup> Bibha Pandey v. Punjab National Bank and Ors. 2021 LLR 359  
<sup>11</sup> Vijaykumaran C.P.V. v. Central University of Kerala and Ors. (2020)12 SCC 426  
<sup>12</sup> Ananta Prasad v. Gauhati High Court and Ors. 2020 LLR 980  
<sup>13</sup> Keshaba Ch. Panda vs. Sambalpur University and Ors 2020 (I) OLR 909  
<sup>14</sup> Institute of Hotel Management, Catering Technology and Applied Nutrition and Ors. vs. Suddhasil Dey and Ors. 2020 (4) SLR 437

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